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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

Nos. 439 and 440

WILLIAM HEYMAN and LYDIA VOGEL HEYMAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

LYDIA VOGEL HEYMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

THOMAS F. BOYLE,
Attorney for Petitioner,
25 Broad Street,
New York 4, N. Y.

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Supreme Court of the United States

OCTOBER TERM—1949.

Nos. ..... and .....

WILLIAM HEYMAN and LYDIA VOGEL HEYMAN,
Petitioners and Appellants below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

LYDIA VOGEL HEYMAN,
Petitioner and Appellant below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show that:

Summary Statement of Matter Involved.

This case was initiated by two petitions in the Tax Court of the United States offered by your petitioners herein for a redetermination of deficiencies in income tax claimed by the Commissioner of Internal Revenue for the

calendar years 1938 and 1939 (R., 9, 22). After a trial in the Tax Court, decisions were rendered in favor of the respondent, Commissioner of Internal Revenue, and against your petitioners, determining that there was a deficiency in income tax of $48.00 and a fraud penalty of $24.00 for the calendar year 1938 (R., 255) and a deficiency in income tax of $68,255.47 and a fraud penalty of $38,497.44 for the calendar year 1939 (R., 256). Both decisions were entered on September 8, 1947. Petitions for Review of said decisions were filed by petitioners with the Court of Appeals for the Second Circuit (R., 257, 265) which affirmed the decision of the Tax Court.

The principal questions involved on said appeal were in connection with the 1935 assignment by Mideastern Contracting Corporation to its stockholders (including petitioner, Lydia Vogel Heyman) of its claim against the City of New York and her assignment of portions of said claim to her husband (petitioner William Heyman) and her son.

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment of the Court below under the provisions of United States Code, Title 28, Section 1254, judgment by the Court of Appeals for the Second Circuit having been rendered on August 2, 1949, and this petition for a writ of certiorari having been filed on or before October 31, 1949.

Questions Presented.

The questions herein presented are (1) whether the proceeds of the assigned claim should be taxed to the ultimate assignees or to the assignor, (2) alternatively, whether such proceeds constitute long-term capital gain as a distribution "in complete liquidation" under Section 115(c) of the Revenue Act of 1938, and (3) whether the fraud penalty herein should be sustained.

Reasons Relied on for the Allowance of the Writ.

1. With regard to the first question presented, petitioners maintain that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Supreme Court of the United States in *Blair* v. *Commissioner,* 300 U. S. 5 (1937), and in conflict with the decision of the Court of Appeals for the Ninth Circuit in *U. S.* v. *Spalding,* 97 F. (2d) 701 (C. A. 9th, 1938) cert. den. 305 U. S. 644 (1938), and in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Iowa Bridge Company* v. *Commissioner,* 39 F. (2d) 777 (C. A. 8th, 1930).

2. With regard to the second question presented, petitioners maintain that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Supreme Court of the United States in *Burnet* v. *Logan,* 283 U. S. 404 (1931).

3. With regard to the third question presented, petitioners maintain that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Duffin* v. *Lucas,* 55 F. (2d) 786 (C. A. 6th, 1932), and in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Jemison* v. *Commissioner,* 45 F. (2d) 4 (C. A. 5th, 1930).

WHEREFORE, your petitioners pray that writs of certiorari issue under the seal of this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the cases numbered and entitled on its docket Nos. 88 and 89 (October Term, 1948)

William Heyman and Lydia Vogel Heyman, Petitioners, v. *Commissioner of Internal Revenue, Respondent, Lydia Vogel Heyman, Petitioner* v. *Commissioner of Internal Revenue, Respondent,* to the end that these cases may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

THOMAS F. BOYLE,
Counsel for Petitioners,
25 Broad Street,
New York 4, N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1949.

Nos. ..... and .....

WILLIAM HEYMAN and LYDIA VOGEL HEYMAN,
Petitioners and Appellants below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

LYDIA VOGEL HEYMAN,
Petitioner and Appellant below,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Opinion of Court Below.

The opinion in the Court of Appeals for the Second Circuit is reported in 176 F. (2d) 389 (1949).

Jurisdiction.

1. The date of the judgments to be reviewed is August 2, 1949.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is U. S. Code Title 28, Section 1254. The judgments referred to above are final judgments affirming the decisions of the Tax Court.

Statement of the Case.

This has already been stated in the preceding petition (pages 1 and 2) which is hereby adopted and made a part of this brief.

Specification of Errors.

1. The Court of Appeals erred in holding that the proceeds of the claim against the City of New York were not taxable to the ultimate assignees.

2. The Court of Appeals erred in holding that the proceeds of the claim did not constitute long-term capital gain as a distribution in complete liquidation under the applicable provision of the Internal Revenue Code.

3. The Court of Appeals erred in holding that the fraud penalty should be sustained.

ARGUMENT

Summary of Argument.

POINT A: The determination of the Court of Appeals that the proceeds of the claim against the City of New York were not taxable to the ultimate assignees is in conflict with a decision of the Supreme Court of the United States and with decisions in other Circuits.

POINT B: The determination of the Court of Appeals that the proceeds of the claim did not constitute long-term capital gain as a distribution in complete liquidation under the applicable provision of the Internal Revenue Code is in conflict with a decision of the Supreme Court of the United States.

POINT C: The affirmance by the Court of Appeals of the fraud penalty is in conflict with decisions in other Circuits.

POINT A.

The determination of the Court of Appeals that the proceeds of the claim against the City of New York were not taxable to the ultimate assignees is in conflict with a decision of the Supreme Court of the United States and with decisions in other Circuits.

The failure of the Court of Appeals for the Second Circuit to follow the rule laid down in *Blair* v. *Commissioner*, 300 U. S. 5 (1937) to the effect that an assignment of beneficial interests is not merely an assignment of future income is urged as a reason for certiorari. The decision herein is also in conflict with a decision of the Court of Appeals for the Ninth Circuit in *U. S.* v. *Spalding*, 97 F. (2d) 701 (C. A. 9th, 1938) cert. den. 305 U. S. 644 (1938), involving an assignment of an oil royalty interest, and is also in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Iowa Bridge Company* v. *Commissioner*, 39 F. (2d) 777 (C. A. 8th, 1930) involving the assignment of a contract for building bridges.

POINT B.

The determination of the Court of Appeals that the proceeds of the claim did not constitute long-term capital gain as a distribution in complete liquidation under the applicable provision of the Internal Revenue Code is in conflict with a decision of the Supreme Court of the United States.

It is contended that the decision of the Court of Appeals herein conflicts with the decision of the Supreme Court of the United States in *Burnet* v. *Logan*, 283 U. S. 404 (1931). If the assignment in the instant case was invalid, there was a complete liquidation in 1937, and future payments on the

claim so distributed in liquidation should, in accordance with the *Logan* case, *supra,* become taxable to the distributees as long-term capital gain under the provisions of Section 115(c) of the Revenue Act of 1938.

POINT C.

The affirmance by the Court of Appeals of the fraud penalty is in conflict with decisions in other Circuits.

The Court of Appeals affirmed the imposition of a fraud penalty of the Tax Court. Petitioners maintain that this decision is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Duffin* v. *Lucas,* 55 F. (2d) 786 (C. A. 6th, 1932), wherein it was held that there could be no fraud in failing to determine a doubtful legal question against oneself. Certainly, the interpretation of the complicated instruments herein constituted a doubtful legal question. At no point in the stream of facts was there any evidence of concealment, nor does the Respondent maintain to the contrary. *Jemison* v. *Commissioner,* 45 F. (2d) 4 (C. A. 5th 1930).

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting writs of certiorari and thereafter reviewing and reversing said decisions.

Dated: October 26, 1949.

THOMAS F. BOYLE,
Counsel for Petitioners,
25 Broad Street,
New York 4, N. Y.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 439

WILLIAM HEYMAN AND LYDIA VOGEL HEYMAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

No. 440

LYDIA VOGEL HEYMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 215-254) are not officially re-

ported. The opinion of the Court of Appeals (R. 279-287) is reported in 176 F. 2d 389.

JURISDICTION

The judgments of the Court of Appeals were entered on August 2, 1949. (R. 287-288.) The petition for writs of certiorari was filed on October 31, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether the taxpayer's share of the net proceeds of a claim against the City of New York of a corporation, one-third of the stock of which was owned by her, constituted income taxable alone to her, or taxable in part to her purported assignees, for the taxable years 1938 and 1939.

2. Whether such proceeds constituted distributions "in complete liquidation" of the corporation within the meaning of Section 115 (c) of the Revenue Act of 1938 and the Internal Revenue Code, and therefore long-term capital gains taxable only to the limited extent provided by Section 117 of those Acts.

3. Whether the Tax Court's decision that a part of the deficiencies asserted against the taxpayer for the taxable years was due to fraud with intent to evade tax, within the meaning of Section 293 (b) of those Acts, is supported by substantial evidence; and whether the evidence supports the imposition of the penalty involved for each taxable year.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Regulations are printed in the Appendix, *infra,* pp. 18-23.

STATEMENT

The facts pertinent to the issues involved in these two cases were found in detail by the Tax Court (R. 220-229, 246-248), and may be summarized as follows:

The taxpayer, Lydia Vogel Heyman,* at all critical times, owned one-third of the capital stock of Mideastern Contracting Corporation, a Delaware Corporation (hereinafter called Mideastern), which was organized in 1927 to enter into a contract with the City of New York to build a subway. (R. 220-221.) It did make the contract and build the subway which was substantially completed by 1931, and did no other business. (R. 221.) It was dissolved pursuant to a resolution of its directors and a certificate of dissolution issued by the Secretary of State of Delaware on October 18, 1933, and continued to exist thereafter only for the limited purpose of winding up its affairs as provided by Section 42 of the Delaware General Corporation Law. (R. 223, 230.) It had in 1931

* For convenience, we refer to petitioner Lydia Vogel Heyman as "the taxpayer", as did the court below (R. 279-280), although this should be understood to mean both her and her husband, William Heyman, wherever appropriate, since they filed a joint return for the taxable year 1938 (R. 229) and were therefore held jointly and severally liable for both the deficiency and the fraud penalty asserted by the Commissioner for that year (R. 255, 287).

filed a claim against the City of New York for extra work done and materials furnished in constructing the subway and, after that claim had been disallowed, a suit was, on May 21, 1932, brought by the corporation against the City on the claim. (R. 222.) The corporation obtained a judgment for $784,064.54 which was entered on January 7, 1938, after trial by jury in that suit. (R. 222.) Thereafter, such negotiations were had that the City on April 22, 1938, paid the attorneys for the corporation the sum of $66,290.59 in partial settlement of that judgment (R. 222-223), and part of the net proceeds was received by the taxpayer in that year (R. 228-229). It was reported in 1938 as a long-term capital gain. (R. 229.)

In 1939, the City agreed with the attorneys for the corporation upon a settlement of the remainder of the judgment and paid them an additional sum of $620,000 in full discharge of it. (R. 223.) The taxpayer received part of the net proceeds of this further payment and reported it in 1939 as a long-term capital gain. (R. 246-247.)

Neither of these receipts so reported equalled the one-third of the net proceeds which would have been proportionate to the taxpayer's stock interest; only one-ninth was reported as the taxpayer had, as later more fully appears, some years previously, attempted to assign one-third of her rights to her husband and one-third to her son (R. 224)—to each of whom, consequently, was paid an amount

equal to her actual receipts (R. 228-229, 247). The payments to both of them have been added to her taxable income in the respective years and the deficiencies determined by taxing all as her income at full rates. (R. 229, 247.)

Meanwhile the following things had been done which are in part relied on by the taxpayer as the legal justification for reporting the two receipts for taxation as she did. (R. 224-228.)

In 1931, such changes were made in the capital structure of Mideastern that on July 20, in that year, its common stock had been reduced to 3,000 shares having no par value and its preferred stock had been retired for cash. (R. 220-221.) On July 30, 1931, these new shares were owned, one-third each by the taxpayer, by Rose Goodman and by James E. Gibbons. (R. 221.) In September of that year, $551,615.01 was distributed out of paid-in surplus to these stockholders and, on March 2, 1932, an additional $3,500 was distributed to them leaving the paid-in surplus of the corporation thereafter, as reported in its income tax returns from 1933 to 1937, inclusive, at $29,384.99. (R. 221.) On October 21, 1931, James E. Gibbons assigned to the taxpayer and Rose Goodman, jointly, all his rights to receive dividends and distributions thereafter on his Mideastern stock but to the extent of $68,200 only, in which amount he was acknowledged to be indebted to them for loans used to acquire the stock. The assignment provided that Gibbons

should not be personally liable for any part of the loans not so paid. (R. 221-222.)

On January 17, 1935, the taxpayer, Charles Goodman, and James E. Gibbons executed an instrument which Mideastern signed by James E. Gibbons, president, in which it was recited that the corporation had been indebted to them as its creditors in the sum of $29,384.99 from March 2, 1932, to the date of the instrument (see R. 155); that it was unable to pay the debt; that it was the owner of a claim filed against the City of New York for extra work done and materials furnished on which suit had been brought; and that the corporation was without funds to pay for the preparation of that suit for trial. It was therefore agreed that the "creditors" would waive all further interest on the "indebtedness" and would wait for payment until the corporation was financially able to pay them. In consideration for such promises, the corporation assigned to such "creditors and/or their assignees all its right, title and interest in and to all claims now owned by it against the City of New York." It also agreed to prosecute its claim for the benefit of the "creditors and/or their assignees, subject however to the creditors' paying all further expenses of such litigation." And the corporation agreed that designated individuals, who were the three stockholders, their spouses, and their children, were the owners of the claim in shares then stated without giving effect to Gibbons' previous assignment. (R. 224.)

On October 28, 1937, Charles Goodman, James E. Gibbons and William Heyman, purporting to act as individuals and as trustees for their respective wives and children, executed an instrument in which they acknowledged the receipt of all the assets of Mideastern, subject to its therein stated liabilities, and in which the net proceeds were transferred in trust to Charles Goodman for distribution to the same persons entitled to share in the proceeds of the claim under the instrument executed on January 17, 1935, but with recognition now given, however, to the rights of the taxpayer and of Rose Goodman to distribution from the shares of Gibbons in accordance with the terms of the agreement executed on October 21, 1931. (R. 225-226.) The claim against the City was not among the assets listed. (R. 226.) Distribution of the proceeds of the claim, however, was made, as to shares at least, in accordance with the provisions of this 1937 agreement. (R. 228-229, 246-247.)

A part of the deficiencies determined against William Heyman and Lydia Vogel Heyman, against James E. Gibbons, and against Charles Goodman, respectively, for 1938, was due to fraud with intent to evade tax. (R. 229.)

A part of the deficiencies against Charles Goodman, James E. Gibbons and Lydia Vogel Heyman, respectively, for 1939 was due to fraud with intent to evade tax. (R. 248.)

On the basis of these facts, the Tax Court, affirming the Commissioner's determinations for both

taxable years (R. 12-15, 25-28), held that the proceeds of the claim in question were taxable to the taxpayer alone as ordinary income and not as capital gains, and that she was liable for the fraud penalty imposed for each taxable year (R. 229-246, 248-254). The court below affirmed (R. 279-287).

ARGUMENT

1. The decision of the court below is in accord with the settled fundamental principle that an anticipatory assignment of income, however skillfully devised, is ineffectual to relieve the assignor of income tax liability where, as here, there was no transfer of the source of the income. *Commissioner* v. *Sunnen*, 333 U. S. 591; *Harrison* v. *Schaffner*, 312 U. S. 579; *Helvering* v. *Horst*, 311 U. S. 112; *Helvering* v. *Eubank*, 311 U. S. 122; *Lucas* v. *Earl*, 281 U. S. 111; *Burnet* v. *Leininger*, 285 U. S. 136; *Commissioner* v. *Tower*, 327 U. S. 280; *Hyman* v. *Nunan*, 143 F. 2d 425, 427 (C.A. 2d); *Doyle* v. *Commissioner*, 147 F. 2d 769 (C.A. 4th); cf. *Helvering* v. *Clifford*, 309 U. S. 331. As the court below said of the 1935 agreement (R. 284) "no present transfer of a capital asset occurred which can be recognized for tax purposes but only the transfer of a right to participate in the future in a division of the proceeds of a lawsuit which continued to be carried in the name of the corporation by the same persons as before."

The record shows that the corporation, required by the City to perform additional construction

work over and above that required by the original contract, actually earned the income in question before it was reduced to possession through litigation. (R. 221, 222, 239.) The real source of the income was never transferred, for the taxpayer, as the owner of one-third of the outstanding shares of the corporation (R. 155, 221), is not shown to have assigned any interests in her *stock* to anyone (R. 240). The Tax Court and the court below properly held, therefore, that since the shares of stock were never assigned and the distributions were liquidating dividends paid on the stock, the taxpayer alone was taxable on the amounts paid her on the shares outstanding in her name in the taxable years. (R. 240, 284-285.)

Moreover, the Tax Court found "from all of the evidence" that the purported assignments were sham (R. 246, 252), and that it could not recognize them as legal and binding for tax purposes for the parties themselves had disregarded them at their pleasure in order to evade taxes for both taxable years (R. 246, 251). The court below, viewing the situation as a whole, therefore, likewise held that the purported assignments under the 1935 agreement were merely a transparent subterfuge to evade taxation; that there was an understatement of taxable income in each year with intent to defraud; and that the Tax Court's finding was supported by substantial evidence. (R. 283, 286-287.) This is in accord with the facts. (R. 220-229, 246-248.)

The cases relied on by the taxpayer (Pet. 3, Br. 7) are distinguishable. Thus, *Blair* v. *Commissioner,* 300 U. S. 5, was clearly distinguished by the court below (R. 284), as previously in *Hyman* v. *Nunan, supra,* p. 427, and by this Court in *Harrison* v. *Schaffner, supra,* pp. 581-582, to the end that in no real sense can the present cases be regarded as involving a complete disposition of property so that the transferees rather than the transferor became accountable for tax on the income therefrom.

Iowa Bridge Co. v. *Commissioner,* 39 F. 2d 777 (C.A. 8th), held that as a result of the transfer by the corporation of certain uncompleted contracts *to its sole stockholder,* the profits on the contracts, when completed by the assignee, were not taxable income to the corporation. In so far as that case upheld the corporate transfer to the sole stockholder, therefore, it supports the decisions of the Tax Court and the court below herein. The question in respect of the attempted assignments here to others than the stockholders, however, was not involved in that case. Moreover, the transfer there was for an actual and valuable consideration, whereas here, as shown, there was no consideration for the purported assignments. Cf. *National Contracting Co.* v. *Commissioner,* 105 F. 2d 488, 493 (C.A. 8th).

In *United States* v. *Spalding,* 97 F. 2d 701 (C.A. 9th), the court held that the assignments made by

the taxpayer, although in terms assignments of money payments, were in effect equity assignments of his beneficial interests in certain oil royalty agreements, and therefore he was not taxable on the royalties paid to the assignees subsequent to the assignments. Thus that case involved the assignment by an individual stockholder of his own property for a valuable consideration, and not the purported assignment of corporate assets, by stockholders who had assigned no interest in their shares, to non-stockholding assignees for no consideration, as here.

2. There is likewise no error in the holding of the court below that the proceeds in question were not taxable as long-term capital gains as distributions in complete liquidation of the corporation in full payment in exchange for the taxpayer's stock, within the meaning of Section 115 (c) of the Revenue Act of 1938 and the Internal Revenue Code (Appendix, *infra,* pp. 19-20). The court below held (R. 285) that if the 1935 assignment was effective as a distribution in partial liquidation in that year, there can be no question that the payments received by the taxpayer in 1938 and 1939 were properly held to be taxable as ordinary income; and that the Tax Court correctly held (R. 240-242) that the proceeds in question were not distributions in complete liquidation of the corporation within the meaning of the applicable statute.

It was permissible for the Tax Court to find from the evidence (R. 145-150, 223) that nothing more than a resolution was adopted in 1933 to dissolve the corporation without any fixed plan of liquidation, and that since no plan providing for a fixed time for the completion thereof, as required by the statute, was shown to have existed, the distributions were not made in complete liquidation of the corporation within the meaning of the terms as defined in the statute (R. 241-242).

The court below properly affirmed the Tax Court's findings to such effect, pointing out merely some of the fatal defects in respect of the agreement of October 28, 1937 (R. 167-171), claimed by the taxpayer to have been a *bona fide* plan of liquidation, which showed that the Tax Court correctly recognized that a substantial compliance with the statute was lacking (R. 285-286). Thus, the court observed, for example, that (1) the 1937 agreement was not intended by the parties to be a *bona fide* plan of liquidation, for it was merely an attempt to subdivide Mideastern's assets following their previous attempt under the 1935 agreement to assign its claim against the City of New York so as to be thereafter no part of the corporation's assets; (2) it did not conform to the essential requirements of the statute because it was made long after the corporation was formally dissolved in 1933, and, thereafter, some distributions in partial liquidation had been made; (3) it was in fact no plan of complete liquidation at all but merely an agreement

by the taxpayer and her co-stockholders and business associates of Mideastern who had control of the remnants of the corporation's assets as to the way they should dispose of them; and (4) it provided for no fixed time limit, as the statute required, as an essential part of a plan for the completion of the liquidation. (R. 286.)

In these circumstances, the 1937 agreement failed to come within the provisions of any of the three requisites of the applicable statute in respect of the "complete liquidation of a corporation". Section 115 (c). Accordingly, the court below properly held that the proceeds in question were taxable in full as ordinary income to the taxpayer, instead of at the lesser rates applicable to long-term capital gains (R. 285-286). Section 117 (a)(4) and (b) of the Revenue Act of 1938 and the Internal Revenue Code, Appendix, *infra*, pp. 20-21. See *Jeffries* v. *Commissioner*, 158 F. 2d 225 (C.A. 5th), certiorari denied, 330 U. S. 843; *Haskell* v. *Commissioner*, 46 B.T.A. 164, affirmed *per curiam*, 133 F. 2d 202 (C.A. 3d); *Ogden* v. *United States*, 67 F. Supp. 777 (E.D. Ark.).

Burnet v. *Logan*, 283 U. S. 404, relied on by the taxpayer (Pet. 7-8), is not in conflict, and the circumstances here make that case plainly inapplicable. Here there was no asset of unascertainable value distributed in liquidation by Mideastern but merely the net proceeds in cash realized from its claim against the City of New York. But, if it be assumed, *arguendo*, that the claim itself was dis-

tributed, nevertheless that was not an amount distributed in complete liquidation within the meaning of Section 115 (c) because of the failure to comply with the statutory requirements, as heretofore pointed out.

3. Finally, there is no error in the holding of the court below that the fraud penalties for both taxable years, asserted by the Commissioner and sustained by the Tax Court, were proper under Section 293 (b) of the Revenue Act of 1938 and the Internal Revenue Code (Appendix, *infra,* p. 22). Upon a complete review of the evidence, the court below held as follows (R. 286-287):

> As to the fraud penalties * * *. It is clear that there was an understatement of taxable income in each year and whether that was done with intent to defraud was a question of fact for the Tax Court whose decision controls if there was adequate evidential support for it. * * *. We think the situation as a whole was shown to have been instinct with fraud and that the finding of the Tax Court, far from being erroneous, was plainly right.

The decision is in accord with the rules laid down by this Court that whether the understatement of income is due to intent to defraud, presents solely a question of fact for the Tax Court, and that its determination to such effect is entitled to finality if supported by substantial evidence, as here. *Helvering* v. *Kehoe,* 309 U. S. 277, 279; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40.

It was permissible for the Tax Court to find "from all of the evidence" that the primary object of the spurious agreements was patently to provide a basis for showing ownership of fractional interests in Mideastern's claim in the stockholders' assignees rather than themselves for income tax purposes, and that the taxpayer and her business associates of Mideastern did this knowingly and with fraudulent intent anticipatory to evading taxes (R. 246); that "The several agreements and the course of conduct of petitioners disclose * * * [pretense of ownership of the claim in others instead of the real owners] and bear out the allegations of fraud as to all of the petitioners" [including the taxpayer] (R. 252); that "From all of the facts * * * a part of the deficiencies against * * * Lydia Vogel Heyman * * * was due to fraud with intent to evade tax" for both taxable years (R. 246, 229, 248); and that the Commissioner had fully sustained his burden of proving fraud (R. 254), as required by law. Section 1112 of the Internal Revenue Code, Appendix, *infra*, pp. 22-23.

Duffin v. *Lucas*, 55 F. 2d 786 (C. A. 6th), certiorari denied, 287 U. S. 611, and *Jemison* v. *Commissioner*, 45 F. 2d 4 (C. A. 5th), relied on by the taxpayer (Pet. 8), are not in conflict. In the *Duffin* case, the court held that the propriety of the inclusion of the amount received as income but not reported in 1922, was too doubtful to make its exclusion evidence of fraud until the courts had exam-

ined and characterized the transaction as constituting income for that year. That case is not even analogous, for there were no agreements there designed fraudulently to divert the taxpayer's income to others and thereby evade taxes, as here, but merely a situation too doubtful, without judicial intervention, to say that the exclusion from income was fraudulent with intent to evade tax.

In the *Jemison* case, the court held that the return which did not show the liquidating dividend in question was not false or fraudulent with intent to evade taxes where the taxpayer was ignorant of the regulations and the law generally, sought expert advice and relied on it, and there was doubt at the time of filing the return whether or not such dividend was properly taxable. That too is quite different from the present case where there was no doubt that the proceeds in question would be taxable when ultimately realized upon completion of Mideastern's suit against the City of New York and distributed as liquidating dividends of the corporation, expert advice was sought from Mideastern's attorney and accountant who drafted the several conflicting agreements solely in compliance with the instructions and at the direction of the taxpayer and her two co-stockholders and the other officers (including her husband) of Mideastern who signed them (R. 91-93, 97, 243-244), and such dividends were deliberately diverted accordingly among the members of the three stockholders' families by anticipa-

tory arrangements through the instrumentality of the several spurious agreements (R. 155-157, 224-229).

CONCLUSION

The decision below is correct. It turns on the particular facts of this case and there is no conflict of decisions. The petition for writs of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
S. DEE HANSON,
Special Assistants to the Attorney General.

DECEMBER, 1949.

APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(f) *Determination of Gain or Loss.*—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in section 111.

* * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; * * *

* * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * *

(c) *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in

exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117, the gain so recognized shall be considered as a short-term capital gain, except in the case of amounts distributed in complete liquidation. For the purpose of the preceding sentence, "complete liquidation" includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding, from the close of the taxable year during which is made the first of the series of distributions under the plan, (1) three years, if the first of such series of distributions is made in a taxable year beginning after December 31, 1937, or (2) two years, if the first of such series of distributions was made in a taxable year beginning before January 1, 1938. * * *

* * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this title—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer * * *

(2) *Short-term capital gain.*—The term "short-term capital gain" means gain from

the sale or exchange of a capital asset held for not more than 18 months, if and to the extent such gain is taken into account in computing net income;

* * *

(4) *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 18 months, if and to the extent such gain is taken into account in computing net income;

* * *

(b) *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 18 months;

66 2/3 per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

* * *

SEC. 276. SAME—EXCEPTIONS.

(a) *False Return or No Return.*—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the

tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * *

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Internal Revenue Code:

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).
(26 U. S. C. 1946 ed., Sec. 293.)

SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in

respect of such issue shall be upon the Commissioner.

(26 U. S. C. 1946 ed., Sec. 1112.)

Sections 22 (a) and (f), 42, 111 (a) and (b), 113 (a), 115 (c), 117 (a) (1), (2) and (4) and (b), and 276 (a) of the Internal Revenue Code are identical with the corresponding provisions of the Revenue Act of 1938 above quoted.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> ART. 42-1. *When included in gross income.*— Except as otherwise provided in section 42 in the case of the death of a taxpayer, gains, profits, and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included as of a different period in accordance with the approved method of accounting followed by him. * * *. If a person sues in one year on a pecuniary claim or for property, and money or property is recovered on a judgment therefor in a later year, income is realized in the later year, assuming that the money or property would have been income in the earlier year if then received. This is true of a recovery for patent infringement. * * *

Section 19.42-1 of Treasury Regulations 103, promulgated under the Internal Revenue Code and covering the taxable year 1939, is identical with Article 42-1 of Treasury Regulations 101, above quoted, applicable to the year 1938.

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